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In the Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, ET AL., PETITIONERS

v.

ARTIST M., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, provides that States wishing to receive federal financial assistance for foster care payments must have a plan approved by the Secretary of Health and Human Services that provides that "in each case, reasonable efforts will be made" to prevent the need for placing a child in foster care, and, if placement is made, to return the child to his home. 42 U.S.C. 671(a)(15). The question presented is whether the requirement that a state plan provide that "in each case, reasonable efforts will be made" by the State creates a federal right that is enforceable in a private action under 42 U.S.C. 1983.

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STATEMENT OF INTEREST

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, establishes a cooperative federal-state program (the Title IV-E program) to provide federal financial assistance to the States for foster care and adoption services.[1] In order to be eligible for payments under the program, States must have a plan, approved by the Secretary of Health and Human Services (HHS), that provides, among other things, that "in each case," the State will make "reasonable efforts" to prevent the need for foster care placement, and to reunify children with their families. 42 U.S.C. 671(a)(15).

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[1] The provisions at issue in this case are codified in Title IV-E of the Social Security Act, 42 U.S.C. 670-679a. Companion provisions codified in Title IV-B of the Social Security Act, 42 U.S.C. 620-628, provide federal assistance for the improvement of child welfare programs.

In this case, the court of appeals held that a class of children may sue a state agency under 42 U.S.C. 1983, claiming that the State is failing to make "reasonable efforts" to keep children in, or return them to, their homes as contemplated by Section 671(a)(15). The United States has a significant financial and administrative interest in the resolution of this issue. By law, the Secretary must reimburse participating States for "foster care maintenance payments" at a rate of between 50% and 83% of the State's costs, as well as covering 75% of training and 50% of administrative expenses in the State's implementation of its Title IV-E plan. 42 U.S.C. 674(a) (1988 & Supp. I 1990). In fiscal year 1990 alone, federal payments for such services totaled nearly $1.5 billion, of which approximately $65.8 million was paid to the State of Illinois.[2]

The United States also has a regulatory interest in this case. The Secretary is required not only to approve a State's Title IV-E plan, but also to discontinue or reduce federal funds if the State's plan no longer complies with the Act or if the State has failed substantially to comply with its plan. 42 U.S.C. 671(b). Moreover, in issuing regulations to implement Title IV-E, the Secretary has specifically rejected the idea that national standards should be imposed on the States through the "reasonable efforts" requirement. Instead, the Secretary has determined that the States should have substantial flexibility in delivering preplacement and family reunification services, and that the proper bodies to provide oversight are the state courts—which are required by 42 U.S.C. 672(a)(1) to determine, in the context of individual foster-care placement proceedings, whether the State has made reasonable efforts to avoid the need for such placement. If

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[2] Staff of House Comm. on Ways and Means, 102d Cong., 1st Sess., *Overview of Entitlement Programs: 1991 Green Book* 797-798 (Comm. Print 1991). All 50 States and the District of Columbia participate in the Title IV-E program. *Ibid.*

the court of appeals' holding is upheld, federal courts will be empowered to review substantial aspects of the operations of state child welfare agencies and to determine what States must do to comply with the "reasonable efforts" requirement. Such Section 1983 actions will not only circumvent the Secretary's enforcement role and the particularized determinations by state courts, but will also thwart the intention of the law to leave substantial discretion to the States on how to keep troubled families together.

STATEMENT

1. The Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act), Pub. L. No. 96-272, 94 Stat. 500, was enacted to provide the States with financial incentives "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. Rep. No. 336, 96th Cong., 1st Sess. 1 (1979). The Act establishes a cooperative federal-state program (the Title IV-E program) that provides federal financial assistance to the States for foster care and adoption services for children who otherwise meet the requirements for assistance under the Aid to Families with Dependent Children (AFDC) program. See 42 U.S.C. 672(a); S. Rep. No. 336, *supra*, at 12. Under the Act, the federal government reimburses the States for the costs of foster care placement when the Act's requirements are satisfied. 42 U.S.C. 672, 674, 675(4)(A).

To participate in the program, States must have a plan, approved by the Secretary of Health and Human Services (HHS), that meets 17 listed requirements. 42 U.S.C. 671(a)(1)-(17). Among other things, the plan must provide that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return

to his home." 42 U.S.C. 671(a)(15). The plan must also provide for the development of a "case plan" for each child that documents, among other things, the child's circumstances, the foster care arrangements, and the services to be provided to facilitate family reunification or permanent placement, and a "case review system" establishing procedures for assuring that children are afforded a case plan and periodic review to evaluate and resolve the child's status. 42 U.S.C. 671(a)(16), 675(1) and (5).

The Act does not define the phrase "reasonable efforts." Nor do the Secretary's regulations spell out specific requirements with respect to "reasonable efforts." The regulations provide only that, in implementing the foster care provisions of a state plan, a State's "case plans" prepared for each child should "include a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family." 45 C.F.R. 1356.21(b), (d)(4). The regulations also include examples of such services, without mandating that a State provide any particular service. 45 C.F.R. 1356.21(a), 1357.15(e)(2) (listing services including "twenty-four hour emergency caretaker, and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters").

Under the Act, the efforts of a State to prevent the need for foster care placement are evaluated by state courts in individual cases. The Act provides that, unless a child has been removed from the home with the voluntary agreement of the child's parent or guardian, a participating State may make reimbursable "foster care maintenance payments" only if there has been "a judicial determination to the effect that continuation" of the child in the home "would be contrary to the welfare of such child and * * * that reasonable efforts of the type described in section 671(a)(15) * * * have been made." 42 U.S.C. 672(a)(1). For children in foster care, family-reunification efforts are evaluated in periodic reviews of

their status conducted at least once every six months by an administrative body or a court, and in a dispositional hearing that must take place within 18 months. 42 U.S.C. 675(1) and (5).

The Act does not provide for any private causes of action. Instead, it directs the Secretary to discontinue or reduce a State's funding upon a determination that an approved plan no longer complies with Section 671(a), or that "in the administration of the plan there is a substantial failure to comply" with the plan's provisions. Payments under Title IV-E shall resume when the Secretary is satisfied that the State is in compliance. 42 U.S.C. 671(b).

2. Respondents are wards of the Juvenile Division of the Circuit Court of Cook County, Illinois. In December 1988, respondents filed a class action against petitioners alleging violations of the Adoption Act by the Department of Children and Family Services (DCFS), an agency of the State of Illinois. Pet. App. 1a-2a. Although respondents' complaint relied on several statutory provisions and the Due Process Clause, the only claim at issue here is the assertion that DCFS violated 42 U.S.C. 671(a)(15) by failing to make "reasonable efforts" to avoid the removal of children from the home and to reunify children with their families where removal had occurred. Pet. App. 3a, 42a n.8. Respondents alleged that DCFS violated the rights of class members in two ways: first, by not making prompt assignments of caseworkers to children who are living at home under protective orders or who are in the custody or under the supervision of DCFS, and, second, by not promptly reassigning cases when the initial caseworker leaves the case. *Id.* at 2a; J.A. 12-14, 25. Respondents urged that the failure to provide for prompt and continuous assignments of caseworkers led to unnecessary neglect and family disintegration. Pet. App. 3a. The violation allegedly gave rise to an implied right of action under the Act and to a claim under 42 U.S.C. 1983. Pet. App. 4a.

The district court certified a class,[3] denied petitioners' motion to dismiss, Pet. App. 32a-50a, and entered a preliminary injunction directing DCFS to assign a caseworker "capable of providing child welfare services" within three days of a case's first hearing in juvenile court, and to reassign a caseworker within three days after the initial caseworker leaves the case. *Id.* at 4a, 51a-56a. In framing its decree, the court relied on statements by DCFS that assigning caseworkers within three days of an initial juvenile court hearing "would not be overly burdensome." *Id.* at 54a; J.A. 48.[4]

2. On petitioners' appeal, the court of appeals remanded for additional findings regarding the nature of the delays in caseworker assignments and the extent to which DCFS had progressed in implementing voluntary reforms. Pet. App. 5a; J.A. 49-52. After the district court made the required findings, J.A. 28-48, the court of appeals affirmed the preliminary injunction, concluding that respondents had a cause of action to enforce the Act's "reasonable efforts" provision under Section 1983. Pet. App. 9a-18a, 20a.

In finding that the "reasonable efforts" provision creates an "enforceable right" within the meaning of Section 1983, the court noted that the Act was intended to benefit needy children requiring child welfare services, and that it imposed a binding obligation on States elec-

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[3] The class consisted of all children who are or will be (a) subjects of juvenile court petitions, (b) in DCFS's custody, or in a home under DCFS supervision by order of the juvenile court, and (c) without a caseworker for a significant period of time. Pet. App. 32a. The court also certified a subclass consisting of "children who are or will be the subjects of * * * petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time." *Ibid.*

[4] The court had initially deferred ruling in light of DCFS's institution of voluntary reforms to remedy delays in caseworker assignments. Pet. App. 33a-34a, 52a. The court ultimately found, however, that those reforms had not been adequately implemented. J.A. 42-44, 48.

ting to receive federal funds. Pet. App. 10a. Relying on *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990), the court also held that the "reasonable efforts" provision was "sufficiently explicit that the pertinent clauses are judicially enforceable." Pet. App. 11a. Although acknowleging that the State has "substantial discretion" in choosing what services to offer in making "reasonable efforts," the court stated that "[t]he judiciary is nevertheless capable of determining whether the state is exerting 'reasonable efforts' to provide those services." *Id.* at 12a. Considering the injunction in this case, the court found that the requirement of assigning caseworkers within three days "fits the estimate given by the DCFS itself of how quickly it would assign caseworkers under its promised reforms"; therefore, the district court had not unduly "inject[ed] itself into the operations of the DCFS." [5] *Id.* at 13a.

Judge Manion dissented. Although acknowledging that the "horror stories recited by the district court produce an almost irresistible desire for judicial intervention," he concluded that "the 'reasonable efforts clause' * * * is too ambiguous and indefinite to form a basis for a recognizable right and an enforceable obligation under the [Act] or § 1983." Pet. App. 20a-21a. Under the majority's decision, the dissent argued, the federal court is moved "from its proper role as impartial arbiter of cases and

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[5] The court also failed to discern a congressional intent to foreclose resort to Section 1983 because it found no "comprehensive remedial scheme" embodied in the Act. Pet App. 13a-14a. As to whether the Act supports an implied right of action to enforce the "reasonable efforts" provision, the court engaged in little independent analysis. It noted that the issue "closely resembles the analysis courts use to determine whether a Section 1983 cause of action exists," and distinguished the two issues only by noting that in the implied right context, the burden falls on the plaintiff to show the existence of a right to sue. Pet. App. 15a. The court then found an implied right to exist, pointing out that petitioners had disputed that claim "for the same reasons that the right is supposedly unenforceable under Section 1983." *Ibid.*

controversies under the law to that of a crisis administrator of child welfare." *Id.* at 29a-30a.

SUMMARY OF ARGUMENT

A. To state a claim under Section 1983 for the violation of a federal statute, the plaintiff must invoke an enforceable federal right. To satisfy that requirement, the provision alleged to be violated must define an interest that is " 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce.' " *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 449 (1989), quoting *Wright* v. *Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-432 (1987). If the interest asserted is "too vague and amorphous" for judicial application, it cannot be enforced under Section 1983. *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2517 (1990).

B. The provision of the Adoption Act on which respondents rely is too vague and amorphous to qualify as an enforceable right under Section 1983. Section 671 (a) (15) requires a state plan to provide that, "in each case, reasonable efforts will be made" to prevent the need for foster case, and to allow the child to return to the family. 42 U.S.C. 671 (a) (15). Although this provision was enacted to benefit children like respondents, and is enforceable by the Secretary's power to cut off federal funds, it is far too general to guide a federal court in reviewing the adequacy of a State's actions. The statutory language directs attention to "reasonable efforts" with respect to individual children, rather than mandating specific, across-the-board procedures. The statute does not lend itself to enforcement through federal court decrees.

The court of appeals, however, approved just such a decree, in reliance on this Court's decision in *Wilder*. That reliance was misplaced. Unlike the requirement considered in *Wilder*, Section 671 (a) (15) provides no

"objective benchmark" to use in measuring the "reasonableness" of the State's efforts, nor do the implementing regulations make the requirement more precise. The delivery of child welfare services is qualitatively different from the issue of "reasonable and adequate" rates considered in *Wilder*; the federal courts have no institutional competence in how to keep families together.

C. The "reasonable efforts" provision in the Act was intentionally left vague and open-ended. Congress recognized that it was establishing a new and ambitious goal for the States in Section 671(a)(15), refrained from imposing overly specific means for carrying it out, and intended the requirement to be applied with deference to the States' need for discretion in this complex field. Likewise, the Secretary drafted regulations with attention to the States' need for flexibility. After exploring the possibility of requiring specific services, the Secretary opted to leave the States freedom to tailor their "efforts" to the needs of individual children.

D. The use of Section 1983 in this child welfare case implicates two factors that heighten the need for close attention to the "vague and amorphous" inquiry. First, domestic relations issues have traditionally been the sole province of the States and their courts. Federal courts therefore have virtually no experience in the matters they would confront in Section 1983 litigation over "reasonable efforts." Second, the Act places particular reliance, not only on the expertise of the Secretary, but also on state-court determinations that state agencies have provided "reasonable efforts." 42 U.S.C. 672(a)(1). Against that background, it is hard to believe that Congress intended the federal courts to give content to the "reasonable efforts" requirement under Section 1983, with the necessary effect of circumventing both the Secretary's interpretation of the Act and the individual determinations of state courts, and requiring that federal courts make basic policy choices that are by their nature not entrusted to the Article III branch.

ARGUMENT

The Adoption Act's Requirement That A State Make "Reasonable Efforts" To Avoid The Dissolution Of Families Is Not An Enforceable Right Under 42 U.S.C. 1983

A. A Federal Requirement That Fails To Provide Sufficiently Specific and Definite Standards For The Courts Is Not Enforceable In A Section 1983 Action

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Although statutory violations are cognizable under Section 1983, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), not every statutory violation gives rise to a Section 1983 action. The plaintiff must assert the violation of a "federal right," *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989), and Congress must not have foreclosed the enforcement of that right under Section 1983. *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (finding Section 1983 action foreclosed by a comprehensive scheme of remedies).

In order to find an "enforceable right," a court must conclude, first, that the provision in question was "intend[ed] to benefit the putative plaintiff." *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2517 (1990). Second, even if an intent to benefit the plaintiff is shown, a Section 1983 action will not lie where the provision at issue, rather than creating an obligation that binds the governmental unit, "does no more than express a congressional preference." *Golden State Transit Corp.*, 110 S. Ct. at 448, quoting *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981). Third, "[i]n all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce.'" *Golden State Transit Corp.*, 110 S. Ct. at 449, quoting

Wright v. *Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-432 (1987). Where "[t]he interest the plaintiff asserts is 'too vague and amorphous'" for the courts to administer, *Wilder*, 110 S. Ct. at 2517, quoting *Wright*, 479 U.S. at 432, a "right" within the meaning of Section 1983 will not be recognized.

In *Wright*, this Court found that tenants living in public housing authority projects had the right under the Brooke Amendment to the Housing Act of 1937, Pub. L. 91-152, § 213, 83 Stat. 389, and its implementing regulations, to enforce certain rent ceilings with respect to utility charges. In finding that the tenants were not relying on a right that was "too vague and amorphous" for judicial enforcement, the Court was guided by the fact that the applicable administrative regulations "specifically set out guidelines that the [regulated entities] were to follow in establishing utility allowances." 479 U.S. at 431-432. The Court thus concluded that the rent provisions were "sufficiently specific and definite to qualify as enforceable rights * * * under § 1983" and were not "beyond the competence of the judiciary to enforce." *Id.* at 432.

Similarly, in *Wilder*, the Court concluded that the Boren Amendment, 42 U.S.C. 1396(a)(13)(A), created enforceable rights in a Section 1983 action. The Amendment required States participating in the Medicaid Program to devise rates to reimburse health care providers "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities * * *." The Court rejected the claim that this standard was too vague and amorphous to be within the competence of the judiciary to enforce. In doing so, the Court noted that the statute and regulation set out factors that a State must consider in setting its rates. 110 S. Ct. at 2522. The Court also emphasized that the statute provides an "objective benchmark" in requiring rates that will compensate "efficiently and eco-

nomically operated facilities" operating in compliance with applicable legal standards, while providing " 'reasonable access' to eligible participants." *Id.* at 2522-2523. The Court added that even though judicial review would entail "some knowledge of the hospital industry," that inquiry was "well within the competence of the judiciary." *Id.* at 2523.

The requirement of specific and definite standards, applicable in all statutory Section 1983 cases, is particularly important where a funding statute for social welfare programs is concerned. Under Section 1983, federal courts review the actions of state officials, may enjoin conduct, and may require the payment of damages. Unless a federal program sets clear enough standards to be applied by the federal courts, there is a serious risk that those courts will infringe on state functions in areas that were intentionally left to state discretion, subject only to federal administrative oversight.[6]

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[6] In *Wilder*, we argued that the interest of providers in having a State make "assurances" to the Secretary under a funding program does not rise to the level of an enforceable right under Section 1983. See *Wilder*, 110 S. Ct. at 2519 n.11. The Court, however, rejected that submission because it concluded that the Boren Amendment's requirement that a State must "find" that its rates comply with the statutory requirements constitutes a "separate obligation[]" that independently warranted the implication of an enforceable right. *Ibid.* It therefore remains an "open question whether an individual's interest in having a State provide * * * 'assurances' [to the Secretary] is a 'right secured' by the laws of the United States within the meaning of § 1983." *Pennhurst*, 451 U.S. at 28. It is equally questionable whether an individual's interest in having a State conform to its "plan approved by the Secretary" (42 U.S.C. 671(a)) is a "right" secured by the laws of the United States for purposes of Section 1983. Such voluntary, intergovernmental arrangements do not expressly confer rights on individuals to particular services. At most, the individual's interest would appear to be that a State that receives federal funds have a plan that is consistent with the Act. Cf. *Wilder*, 110 S. Ct. at 2527 (Rehnquist, C.J., dissenting).

B. The Requirement That A State Make "In Each Case, Reasonable Efforts" To Avoid The Need For Foster Care Or To Reunify The Family Is Too Vague And Amorphous To Qualify As An Enforceable Right Under Section 1983

Section 671(a)(15) requires a state plan to provide that, "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. 671(a)(15). That requirement, unlike the financial requirements considered in *Wright* and *Wilder*, is aimed at a profound social problem of great complexity and diversity: the predicament of children who may need to be, or have been, removed from their homes and placed in the foster care system. Although Section 671(a)(15) requires, as a condition of receiving federal funds, that participating States make "reasonable efforts" to avoid the breakup of families, and to seek to reunite them, that stipulation is too "vague and amorphous" to be enforced by federal courts in Section 1983 actions.

Section 671(a)(15) does satisfy two elements of the test for identifying an enforceable right. *Wilder*, 110 S. Ct. at 2517; *Golden State Transit Corp.*, 110 S. Ct. at 448; see also *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991). The "reasonable efforts" requirement of Section 671(a)(15) is plainly intended to benefit children such as the plaintiffs in this case. Moreover, the statute makes compliance with that requirement an express condition of a State's receiving funding under the Act; the requirement is mandatory, not precatory. Cf. *Pennhurst*, 451 U.S. at 18-27. The statute mandates that "[i]n order for a State to be eligible for payments under this part, it *shall* have a plan approved by the Secretary which * * * provides that, in each case, reasonable efforts will be made" to achieve the stated goals. 42 U.S.C. 671(a)(15) (emphasis added). The statute also authorizes the Secretary

to refuse or reduce funding to any State that fails to comply with Section 671(a)'s provisions. 42 U.S.C. 671 (b). The plain language of the statute therefore makes clear that the "reasonable efforts" requirement is binding on States that accept funding under the Act.[7] *Wilder*, 110 S. Ct. at 2519.

Nevertheless, as this Court has recognized, mandatory and administratively enforceable requirements are not enforceable under Section 1983 where they are "too vague and amorphous" to be within the competence of the judiciary. *Wilder*, 110 S. Ct. at 2517. The "reasonable efforts" requirement of the Adoption Act is such a vague and amorphous requirement. The language of Section 671(a)(15) gives little indication that Congress intended to create a judicially enforceable right to attack practices in a State's provision of child welfare services, particularly systemwide practices, as respondents have sought to do in this case. The provision contemplates individualized reasonable efforts "in each case"; it does not suggest (and appears inconsistent with) the notion that any particular range of services is *per se* required. Indeed, the phrase "reasonable efforts" itself connotes the idea that a wide variety of steps are likely to be sufficient in seeking to

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[7] The dissent in the court of appeals was of the view that Section 671(a)(15)'s "reasonable efforts" requirement is so vague that States accepting funding under the Adoption Act cannot understand what obligations the Section creates, and, therefore, the Section "cannot create binding obligations and rights." Pet. App. 27a. We disagree. While the "reasonable efforts" requirement is too vague to create a *judicially enforceable right* in favor of the plaintiffs, the statute makes clear that a State that accepts funding has an *administratively enforceable obligation* to make the reasonable efforts described by the Section. Nor is the requirement that a State make "reasonable efforts" on behalf of children who are not yet in foster care merely precatory on the theory that the federal government does not pay for such services. The State's provision of preplacement services is integral to the Act's goal of avoiding unnecessary foster care placements where children can be kept at home. It also serves to reduce State payments for foster care, which the federal government must reimburse.

attain the Act's overall goals of trying to prevent placement and reunify families, and that none are mandated across the board.[8]

The circumstances that led the Court to conclude that the requirements at issue in *Wright* and *Wilder* were susceptible of judicial enforcement are wholly lacking here. First, neither the statute nor the regulations set forth any factors that a State must consider in determining what efforts are reasonable to keep children in their homes. The regulations provide only a list of preplacement preventive and reunification services that a State *may* provide in implementing requirements imposed under 42 U.S.C. 627(a)(2)(C) and (b)(3)—requirements that address, on a program-wide level, concerns similar to those reflected in the case-specific "reasonable efforts" requirement of Section 671(a)(15). See 45 C.F.R. 1356.21(b), 1357.15(e)(2). The list does not define what a State must consider in its provision of particular reasonable efforts; it is in the nature of a suggestion of possible services. The regulation, therefore, does not give specific, judicially enforceable content to the vague provisions of Section 671(a)(15).

Second, the "reasonable efforts" requirement is not tied to any "objective benchmark" as was true in *Wilder*, 110 S. Ct. at 2523. The requirement at issue in *Wilder* lent itself to judicial enforcement because a court is fully

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[8] The court of appeals mandated such universal services by upholding the injunction that caseworkers be assigned within three days *in all cases*. That order intruded on the State's discretion to tailor services to individual families' needs. See Pet. App. 16a n.11 (State argued that injunction "deprived [DCFS] of the 'flexibility' to make assignments at different rates of speed depending on the gravity of the case or the expertise required"). The court believed that its intrusion was justified by the fact that the State itself had given the three-day "estimate * * * of how quickly it would assign caseworkers under its promised reforms." Pet. App. 13a. But the State's "estimate," made as a matter of internal policy, is not enforceable under *federal* law, and certainly cannot be construed as a mandatory requirement "in each case."

capable of taking evidence concerning the costs faced by an "efficiently and economically operated facility" providing care in accordance with applicable federal and state laws, and then determining whether state-selected rates are "reasonable and adequate" to cover such costs. No such objective benchmark can be found to assist federal courts in actions raising the question of what preplacement preventive and reunification services will constitute "reasonable efforts" to keep children in or return them to their homes. Reasonable with respect to what? What other States are doing? What state funds are available? The answer in *Wilder* was spelled out in the statute: reasonable with respect to what costs an efficiently and economically operated facility would incur. Here, the determination is not a matter of calculating costs. The determination of what assistance to provide is intrinsically tied to the facts of an individual case, and to concepts of appropriate services. The statutory standard is reasonable efforts "in each case." 42 U.S. 671(a)(15). In some cases, reasonable efforts to prevent the removal of the child from the home might even mean no efforts, when it is clear that the health or safety of the child dictates swift removal. A federal court would lack any objective scale by which to quantify and measure the reasonableness of the State's efforts to preserve and reunify families.

The "reasonable efforts" requirement is qualitatively different from the reasonableness requirements at issue in *Wright* and *Wilder*. In both of those cases, state officials were bound by federal law to come up with a *number*—a reasonable utility allowance in *Wright*, and a reasonable reimbursement rate in *Wilder*. Although States had discretion in determining the precise method they would use to calculate the number, there was no question about the general nature of their task. By contrast, the requirement of making "reasonable efforts" to preserve families is wholly open-ended. A vast range of different types of actions might be reasonable. Different

cases call for different types of efforts, and a single case might be reasonably handled in many different ways. There is no "right answer"; determining what is "reasonable" in this area involves policy judgments of the sort the federal courts are not empowered to make. See pp. 22-27, *infra*.

Allowing private enforcement of the "reasonable efforts" requirement in Section 1983 actions—particularly in class actions such as the present one—therefore creates a distinct danger of undermining, rather than promoting, the Act's objectives. The statutory standard and the regulations implementing it are deliberately vague, so as to leave state administrators with flexibility. By their nature, however, federal court injunctions cabin discretion. Indeed, the framing of such injunctions to enforce vague statutory requirements may put federal courts in the role of managing state agencies and formulating policy. To allow enforcement of the "reasonable efforts" requirement under Section 1983 would thus deprive state administrators of the flexibility needed to keep families together.

C. The Legislative And Regulatory Background Of The "Reasonable Efforts" Requirement Is Not Consistent With Federal Court Enforcement Under Section 1983

1. The legislative history of the Adoption Act demonstrates that Congress did not intend to mandate a floor level of "reasonable efforts" susceptible to judicial enforcement in Section 1983 actions. Congress understood that the Act required major changes in child welfare services, and it intended to leave the States discretion in how to implement those changes.

The Act grew out of intensive consideration of the proper role of the federal government in the delivery of child welfare services. Prior to the Act, federal funds were not specifically provided for services designed to keep children at home, instead of being placed in the foster care system. But studies showed that children were often removed from their homes without such efforts hav-

ing been made, and "many children remained in foster care for long periods of time, a phenomenon known as 'foster care drift.'" D. Ratterman, *Reasonable Efforts: A Manual For Judges* 2 (1987); see also 45 Fed. Reg. 86,818 (1980) (comments accompanying proposed rulemaking under the Act); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 833-836 (1977).

To address that problem, the Adoption Act comprehensively revised federal funding programs supporting state child welfare services. Testimony before Congress indicated that "new requirements in the law" would be necessary "to assure that State programs include a variety of services to prevent the need for foster care, as well as to protect children who, despite such services, nonetheless must be placed in foster care." H.R. Rep. No. 136, 96th Cong., 1st Sess. 28 (1979). As part of its "major restructuring" of existing law, S. Rep. No. 336, *supra*, at 1, Congress amended the definition of "child welfare services" in Title IV-B of the Social Security Act to include services aimed at "preventing the unnecessary separation of children from their families," and "restoring to their families children who have been removed." 42 U.S.C. 625(a)(1)(C) and (D). Congress also required States to implement a program of family reunification services and preplacement preventive services in order to qualify for a variety of federal funds. 42 U.S.C. 627(a)(2)(C) and (b)(3); 42 U.S.C. 672(d).

In the provision at issue here, Congress created the "reasonable efforts" requirement, while other provisions required States to develop individual "case plan[s]" and "case review system[s]" to ensure periodic review of the status of foster care children. 42 U.S.C. 672(a)(15) and (16). The Act thus "mark[ed] an historic shift in the thrust of Federal policy away from foster care * * * toward permanent arrangements for children, involving the retaining of the children in their own homes, * * * bringing their homes back together * * * and encouraging the adoption of children who are able to be adopted."

125 Cong. Rec. 29,504 (1979) (remarks of Sen. Moynihan).

Congress recognized that the Act was an "ambitious undertaking" in an area not susceptible to "dramatic or complete" cures. 126 Cong. Rec. 14,645 (1980) (remarks of Rep. Conable). In keeping with that observation, the Senate Report acknowledged that "substantial progress [toward permanent placement of children] cannot be achieved by Federal fiat but can come about only through concerted effort and commitment on the part of State and local governments which have primary responsibility for carrying out these programs." See S. Rep. No. 336, *supra*, at 16. Recognizing that the new approach would take time to implement, Congress delayed the effective date of the "reasonable efforts" requirement until October 1, 1983, 42 U.S.C. 671(a)(15), 672(a)(1), and refrained from spelling out specific services that States must provide.[9] The philosophy underlying these steps is reflected in the House Report's statement that "the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child." H.R. Rep. No. 136, *supra*, at 47.

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[9] The House bill, as originally passed, did not have a "reasonable efforts" provision, but would have required a participating State to have in place programs to deliver "adequate preventive services" and "family reunification" services, and listed specific types of services that a State "may" provide to satisfy those requirements. H.R. 3434, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 136, *supra*, at 5, 46-47, 79. Even those suggested criteria, however, were not enacted into law. State social services representatives urged the Senate "[t]o emphasize objectives rather than mandate too highly specific procedures upon the States," *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 118 (1979) (testimony of Barbara B. Blum), and the Act as passed by both Houses accords with that approach. H.R. Conf. Rep. No. 900, 96th Cong., 2d Sess. 56-57 (1980).

2. The Secretary's administration of the Act confirms that the "reasonable efforts" requirement is not sufficiently specific to give rise to an enforceable right under Section 1983. As noted above, the regulations under Section 671(a)(15) are extremely general; they do not impose specific standards that a State must follow. 45 C.F.R. 1356.21(b), 1357.15(e)(2). The history of those regulations shows that this choice was deliberate.

The Secretary's original notice of proposed rulemaking indicated that States could meet the "reasonable efforts" requirement by satisfying proposed regulations dealing with reunification and preplacement preventive services under the Title IV-B program. 45 Fed. Reg. 86,823 (1980). Those services, in turn, were defined in the proposed regulation with a great deal of specificity. As to reunification services, States would have to provide "day care services, homemakers or caretaker services, family or individual counseling for parent(s) and child * * *, and other * * * necessary and appropriate [services]." *Id.* at 86,829. As to preplacement preventive services, the proposed rules would have mandated "twenty-four hour emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; and access to emergency financial assistance and arrangements for the provision of temporary child care to provide respite to the family for a brief period." *Id.* at 86,823.

On July 15, 1982, however, the Secretary withdrew this proposal. 47 Fed. Reg. 30,932. The Secretary explained that "the proposed regulations contained a number of provisions that, we now believe, would unduly limit State flexibility or impose unjustifiable costs. The proposal has therefore been thoroughly evaluated and revised and inappropriate provisions have been eliminated." *Id.* at 30,934. The new proposal "remove[d] many of the detailed and specific requirements" in the original proposal. *Ibid.* The Secretary noted that, where the language of the Act was not highly explicit, the Act "sug-

gests [that] Congress chose to leave discretion to the Secretary." *Ibid.* Exercising that discretion, the Secretary determined "to permit States flexibility in implementing these sections of the statute." *Ibid.* The proposal would have defined "reasonable efforts" as the States having preplacement and family reunification programs in place that met only the general requirements of 42 U.S.C. 627 (a)(2)(C) and (b)(3) of the Title IV-B program. *Id.* at 30,935; see also *id.* at 30,941 (setting forth proposed rule). In commenting on those requirements, the Secretary stated that HHS intended "to leave the decision on the nature and content of the reunification and placement preventive services programs to the States." *Id.* at 30,938.

The final rule, however, retreated even from that requirement, in favor of giving the States greater freedom to determine how to make "reasonable efforts." 48 Fed. Reg. 23,104 (1983). The Secretary explained that state agencies had criticized the prior proposal for ignoring that "[i]n these times of limited resources and substantial service demands, * * * States must have wide latitude to develop resource priorities and service choices." *Id.* at 23,106-23,107. The Secretary agreed with the States, explaining:

> The Department believes that it is an inappropriate and unnecessary Federal intrusion to dictate nationally a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that it is essential to give the States the flexibility and responsibility for these service decisions.

Id. at 23,107. The final rule took that concern into account, and established the requirement that individual case plans should reflect the "reasonable efforts" made. *Id.* at 23,106-23,107.[10]

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[10] Recognizing the need for "information and guidance to the States" in this area, the Department stated that it intended to issue "non-binding informational materials which will discuss preplace-

The Secretary's considered decision to permit the States broad freedom in devising their programs, in line with their resources and the needs of particular families, is a reasonable construction of the Act entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In that context, to allow federal courts to interpret the meaning of the general "reasonable efforts" requirement in Section 1983 actions would interfere not only with state child welfare programs, but with the decisions of Congress and the Secretary to leave discretion to the States.

D. "Reasonable Efforts" Litigation Under Section 1983 Would Require Federal Courts To Interpret A Vague Statute In A Field Of Particular State Concern, And In Which Federal Courts Are Particularly Inexperienced

The application of Section 1983 in this case is particularly troubling because it launches the federal courts into a field from which they have historically abstained, and in which they have little institutional competence. Domestic relations is a traditional province of the States and state courts. The limited federal intervention brought about by the Act was specifically entrusted to an expert agency and to the family courts of the States. Those considerations suggest that heightened attention be given in this case to the rule that federal duties must be "specific and definite" before they will create "rights" enforceable in federal court actions under Section 1983.

1. The entire field of domestic relations has, throughout the history of our Nation, been the special preserve of the States; federal courts have little or no experience with

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ment preventive and reunification services and 'reasonable efforts.'" 48 Fed. Reg. 23,107. "[I]n the interim," the Department noted, "States may want to consider inclusion of the services listed in 45 C.F.R. 1357.15(e) as they move towards implementing the 'reasonable efforts' and service program requirements of the Act." *Ibid.*

matters pertaining to family law. In *Barber* v *Barber*, 62 U.S. (21 How.) 582, 584 (1859), the Court "disclaim[ed] altogether any [federal court] jurisdiction" over domestic relations suits. Later, in *Ex parte Burrus*, 136 U.S. 586 (1890), this Court held that a federal district court could not issue a writ of habeas corpus to return a child to the custody of her father when the child was being illegally held by her grandparents. The Court stated that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593-594. In line with these holdings, federal courts, even when diversity jurisdiction exists, will not determine child custody because an inquiry into the best interests of a child—the touchstone of custody determinations—"is within the peculiar province, experience, and competence of the state courts." *Bennet* v. *Bennet*, 682 F.2d 1039, 1042-1043 (D.C. Cir. 1982).

The respect for state competence in domestic relations applies even where federal statutes are involved. For example, in *Thompson* v. *Thompson*, 484 U.S. 174 (1988), the Court refused to hold that the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A, creates an implied private right of action for a federal court to determine which of two conflicting state custody decrees is valid. The Court explained that such actions would "entangle [federal courts] in traditional state-law questions that they have little expertise to resolve." 484 U.S. at 186.[11]

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[11] See also *Moore* v. *Sims*, 442 U.S. 415, 435 (1979) (abstaining from the adjudication of a constitutional attack on a state child welfare statute during the pendency of state proceedings because "[f]amily relations are a traditional area of state concern"); *United States* v. *Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."); *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956) (applying state domestic law under a federal statute because "there is no

As a consequence, federal judges have little if any experience or expertise upon which they could draw in performing the formidable task of giving content to the requirement that a state agency make "reasonable efforts" to preserve families before and after removing a child from its home. When a Section 1983 action would entangle the federal judiciary so deeply into an area traditionally reserved to the States, and as to which federal judges lack expertise, this Court should hesitate to find that an open-ended federal statutory requirement, such as "reasonable efforts," is "sufficiently specific and definite" to create an enforceable right. *Wright*, 479 U.S. at 432.

2. The Adoption Act, of course, does create federal requirements in the field of child welfare, and to that extent involves the federal government in affairs traditionally governed solely by the States. But rather than expecting that the responsibility for interpreting the "reasonable efforts" requirement would fall to federal courts in Section 1983 actions, it seems far more likely that Congress intended the "reasonable efforts" requirement to be developed by the authorities that would have the competence to enforce it: the Secretary and the state courts. That is, of course, what the Act does. First, it gives the Secretary the power to enforce the "reasonable efforts" requirement by disapproving any state plan that does not meet the Act's requirements, or by withholding funds from States that do not "substantial[ly]" comply with approved plans. 42 U.S.C. 671(b). The Secretary is in a position to make expert judgments as to whether a State is putting forth "reasonable efforts," and whether any failure to comply is "substantial." Particularly in light of the Secretary's determination that the "reasonable efforts" requirement is not susceptible of detailed, national definitions, but must be applied by the States in light of all of the circumstances of each individual case, it is dif-

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federal law of domestic relations, which is primarily a matter of state concern").

ficult to imagine that the Act envisions a supplementary role for the federal courts under Section 1983.[12]

Second, the Act expressly dictates that state courts will play a role in giving content to the "reasonable efforts" requirement "in each case." 42 U.S.C. 671(a)(15). The Act provides that the federal government will reimburse the States for foster care payments only if "the removal from the home * * * was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of [the] child and * * * that reasonable efforts of the type described in section 671(a)(15) * * * have been made." 42 U.S.C. 672(a)(1). Such a determination is to be made by the appropriate court when the state agency seeks to remove the child from his home. See also 42 U.S.C. 675(5)(B) and (C) (requiring periodic review and dispositional hearing by an administrative body or a court). It is evident, therefore, that Congress looked to state courts as primary enforcers of the "reasonable efforts" requirement.[13] States

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[12] To permit Section 1983 actions here would undermine the values underlying the rule of *Chevron*—that courts should respect the exercise of agency expertise and defer to the permissible policy judgments of politically accountable bodies. 467 U.S. at 865-866. Where permitting a Section 1983 action would disrupt the proper relationships among the court, the agency, and the regulated entities, courts should not find an open-ended statutory requirement (such as the provision for "reasonable efforts"), which has not been further defined by the agency, to create an "enforceable right" within the meaning of Section 1983. See Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 416-417, 428-430 (1982).

[13] The Senate Report expressed confidence that the judicial-determination provision would provide "an important safeguard against inappropriate agency action." S. Rep. No. 336, *supra*, at 16. In response to the suggestion that "the judicial determination requirement can become a mere *pro forma* exercise in paper shuffling to obtain Federal Funding," the Report was "unwilling to accept as a general proposition that the judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statutes for the protection of children." *Ibid.*

characteristically provide a specialized juvenile or family court that acquires considerable expertise in child custody matters; such courts are in a far better position than generalist federal courts to determine whether "reasonable efforts" have been made to prevent the breakup of the family.[14]

To insert federal judges into the "reasonable efforts" inquiry would disrupt the careful scheme created by Congress and the Secretary. It would mean that federal judges, largely inexpert in custody matters, would review the discretionary decisions of state agencies, create specific standards that they must meet, and bypass the Secretary's determination that it is unwise and unworkable to interpret "reasonable efforts" to mandate particularized standards as a matter of law. The federal courts are not competent bodies to perform that task. There is no consensus among policy makers or child welfare experts as to how Congress's goal of "reasonable efforts" might best be achieved.[15] Answers can be gathered more readily

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[14] The Secretary has also determined to rely on state courts to enforce the "reasonable efforts" requirement. In auditing state programs for purposes of reimbursing foster care maintenance payments under 42 U.S.C. 472(a), HHS reviews the case file to see that a state judge has determined that such efforts have been made. See HHS, *Policy Interpretation Question*, ACYF-PIQ-86-02, at 3-4 (May 8, 1986); HHS, *Financial Review Guide for On-Site Reviews of the Title IV-E Foster Care Program*, Att. A (Eligibility Checklist), at 3 ¶ 16.b (Aug. 1985). See also ABA Young Lawyers Division, *Reasonable Efforts To Prevent Foster Placement* 37 (June 1985).

[15] For example, one article observed that there is "confusion" and "considerable debate" about "family-centered placement prevention services," and went on to identify "three distinct models—crisis intervention, home-based, and family treatment—each having its own philosophical assumptions, theoretical models, and organizational or structural features." Nelson, Landsman & Deutelbaum, *Three Models of Family-Centered Placement Prevention Services*, 59 J. Child Welfare League 3, 3-4 (1990), *reprinted in Federally Funded Child Welfare, Foster Care, and Adoption Assistance Programs: Hearing Before the Subcomm. on Human Resources of the*

through the work of an expert agency or the accumulated experience of specialized state tribunals than through adversary litigation. To determine what constitutes "reasonable efforts" in this policy-laden area requires both a level of expertise that federal courts lack and basic policy choices that are by their nature not entrusted to the Article III branch. Against that background, the "reasonable efforts" requirement is too vague and amorphous to create a "right" that federal courts are competent to enforce under Section 1983.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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House Comm. on Ways and Means, 101st Cong., 2d Sess. 114, 115-116 (1990). A federal court is ill equipped to determine which, if any, of those models would best comport with a "reasonable efforts" requirement.

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